

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 SHELLERY MOORE,
5 Petitioner,
6 v.
7 WARDEN, et al.,
8 Respondents.

Case No. 2:17-cv-00362-APG-VCF

ORDER

9
10 Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254
11 (ECF No. 7), respondents' motion to dismiss (ECF No. 9), petitioner's opposition (ECF No. 13),
12 and respondents' reply (ECF No. 15). The petition is untimely so I dismiss for that reason.

13 Congress has limited the time in which a person can petition for a writ of habeas corpus
14 under 28 U.S.C. § 2254:

15 A 1-year period of limitation shall apply to an application for a writ of
16 habeas corpus by a person in custody pursuant to the judgment of a State court.
The limitation period shall run from the latest of—

17 (A) the date on which the judgment became final by the conclusion of
18 direct review or the expiration of the time for seeking such review;

19 (B) the date on which the impediment to filing an application created by
20 State action in violation of the Constitution or laws of the United States is
removed, if the applicant was prevented from filing by such State action;

21 (C) the date on which the constitutional right asserted was initially
22 recognized by the Supreme Court, if the right has been newly recognized by the
Supreme Court and made retroactively applicable to cases on collateral review; or

23 (D) the date on which the factual predicate of the claim or claims presented
could have been discovered through the exercise of due diligence.

24 28 U.S.C. § 2244(d)(1). If the judgment is not appealed, then it becomes final 30 days after entry,
25 when the time to appeal to the Nevada Supreme Court has expired. *See Gonzalez v. Thaler*, 565
26 U.S. 134, 150 (2012). *See also* Nev. R. App. P. 4(b), 26(a). Any time spent pursuing a properly
27 filed application for state post-conviction review or other collateral review does not count toward
28

1 this one-year limitation period. 28 U.S.C. § 2244(d)(2). The period of limitation resumes when
2 the post-conviction judgment becomes final upon issuance of the remittitur. *Jefferson v. Budge*,
3 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not
4 “properly filed” and does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408,
5 417 (2005).

6 Section 2244(d) is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645
7 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been
8 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and
9 prevented timely filing.” *Id.* at 649 (quoting *Pace*, 544 U.S. at 418).

10 The state district court entered a judgment of conviction against petitioner on January 10,
11 2014. ECF No. 10-10. Petitioner did not appeal, and the judgment of conviction became final at
12 the end of February 10, 2014.¹ On February 27, 2015, petitioner filed in the state district court a
13 motion for an extension of time to file a state post-conviction habeas corpus petition. Petitioner
14 noted that she was extradited to California on July 5, 2014 to face charges in that state, and that
15 she returned to Nevada on January 5, 2015. ECF No. 10-11. The state district court granted the
16 motion and gave petitioner through May 26, 2015 to file a post-conviction habeas corpus petition.
17 ECF No. 10-12. It appears from the state post-conviction petition that petitioner tried to deliver it
18 to the prison’s law library on May 26, 2015, for mailing to the state district court, but the law
19 library was closed that day. The state district court received her petition on June 3, 2015. ECF
20 No. 10-13. On September 17, 2015, the state district court denied the petition as untimely under
21 Nev. Rev. Stat. § 34.726(1). ECF No. 10-24. Petitioner appealed. On December 29, 2015, the
22 Nevada Court of Appeals affirmed. ECF No. 10-29. The petition was untimely, even with the
23 extension granted, because Nevada does not observe a prison mailbox rule for post-conviction
24 petitions. A petition is not filed for the purpose of § 34.726(1) until the state district court files
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26 ¹ Respondents argue that the time to appeal expired on February 9, 2014. That date was a
27 Sunday. The time to appeal expired on the next judicial day, Monday, February 10, 2014. Nev.
28 R. App. P. 26(a)(3). The effect on the calculation of timeliness is negligible.

1 the petition.² *Gonzales v. State*, 53 P.3d 901, 903-04 (Nev. 2002). Remittitur issued on January
2 25, 2016. ECF No. 10-30.

3 Petitioner then turned to this court. Her petition is dated January 11, 2017. The court
4 received the petition on February 3, 2017. Rule 3(d) of the Rules Governing Section 2254 Cases
5 in the United States District Courts is a prison mailbox rule. Petitioner did not state in the space
6 provided when she delivered the petition to prison officials for mailing, but the effect upon the
7 calculation of timeliness is negligible.

8 The petition is untimely no matter how the court calculates the time. With a straight
9 application of 28 U.S.C. § 2244(d), the one-year period started running on February 11, 2014,
10 after the judgment of conviction became final. Because Nevada does not have a prison mailbox
11 rule, tolling under § 2244(d)(2) could not start, if at all, until the state petition was filed in the
12 state district court. *Orpiada v. McDaniel*, 750 F.3d 1086, 1089-90 (9th Cir. 2014). In petitioner's
13 case, the state post-conviction petition was untimely, not "properly filed" within the meaning of
14 § 2244(d)(2), and could not toll the one-year period. *Pace*, 544 U.S. at 417. If petitioner mailed
15 her petition when she dated her petition, January 11, 2017, then 1,066 days passed between
16 finality of the judgment of conviction and commencement of the action. The petition is untimely.

17 In her opposition, petitioner states that she has arguments for equitable tolling because of
18 transfers between Nevada and California, the extension of time to file the state petition, and the
19 mailbox rule. The mailbox rule cannot help petitioner because Nevada does not have a mailbox
20 rule for post-conviction petitions. Nevertheless, the petition still would be untimely even if I
21 tolled the period of limitations for the time that petitioner was in California, the extra time that
22 petitioner had to file her state petition,³ and the time that the state petition was pending. Between
23

24 ² Even if the prison law library was open on May 26, 2015, the state petition still would have been
25 untimely. The state district court would not have received the state petition in the mail until May
26 27, 2015, at the earliest, one day after the extended period to file the petition had expired.

27 ³ No reason exists to toll the time between petitioner's return to Nevada and the filing of her state
28 petition. During that time, she had no petition pending in state court, and nothing was preventing
her from filing a petition. The court does not count this time simply to show that even under a
calculation that is unrealistically favorable to petitioner, the federal petition still is untimely.

1 the start of the one-year period (on February 11, 2014) and petitioner's extradition to California
2 on (July 5, 2014), 145 days passed. I would not count the time between petitioner's extradition to
3 California on July 5, 2014 and the issuance of the remittitur at the end of the state post-conviction
4 proceedings on January 25, 2016. Between the resumption of the one-year period (on January 26,
5 2016) and the assumed mailing of the federal petition (on January 11, 2017), 352 days passed.⁴ A
6 total of 497 non-tolled days thus passed, and that exceeds the one-year period of § 2244(d)(1).
7 The petition still would be untimely.

8 Reasonable jurists would not find my procedural ruling to be debatable or wrong, and I
9 will not issue a certificate of appealability.

10 Respondents also argue that some grounds are not exhausted, that one ground is
11 procedurally defaulted, and that petitioner has not named the correct respondent. I will not
12 address these arguments because I am dismissing the action as untimely.


13 Petitioner has filed a motion for appointment of counsel. ECF No. 11. Given that even the
14 most favorable calculations for petitioner still would mean that the petition is untimely, counsel
15 would be of no assistance to petitioner.

16 IT THEREFORE IS ORDERED that petitioner's motion for appointment of counsel (ECF
17 No. 11) is **DENIED**.

18 IT FURTHER IS ORDERED that respondents' motion to dismiss (ECF No. 9) is
19 **GRANTED** in part. This action is **DISMISSED** with prejudice because it is untimely. The clerk
20 of the court shall enter judgment accordingly and close this action.

21 IT FURTHER IS ORDERED that a certificate of appealability will not issue.

22 DATED August 27, 2018.

23 
24 _____
25 ANDREW P. GORDON
26 United States District Judge

27 ⁴ Petitioner did not state when she delivered her federal petition for mailing to the court. I could
28 use the date of receipt, February 3, 2017, as the date of effective filing. In that case, the time
between the issuance of the state-court remittitur on January 25, 2016 and the receipt of the
petition on February 3, 2017, itself would be sufficient for me to rule that the federal petition is
untimely.